IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1859

GREY LINE AUTO PARTS, INC.,
a Virginia corporation,

Petitioner,

v.

SAMUEL T. THARP, ERNEST L. STRICKLAND,
BRUCE H. SNEAD and EARL H. SNEAD, INC.,
a Virginia corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Samuel T. Tharp, *et al.*, respectfully pray that the Petition for Writ of Certiorari (hereinafter "the Petition") be denied and that they be awarded additional damages against Petitioner, pursuant to Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912, for their damages for delay caused by Petitioner in this appeal, and in support thereof set forth the following.

OPINIONS BELOW

The unpublished *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit, decided April 19, 1979, is appended to the Petition, pages i through iii. Among other contentions advanced by Petitioner in that court, the Fourth Circuit in affirming the judgments in the consolidated appeal specifically considered the same issue advanced in the Petition, i.e., whether "the evidence established that the (Respondents) could not have suffered any damages." (Petition, p. iii.) Petitioner did not move for a rehearing in the Fourth Circuit following that court's decision. No written opinion was delivered by the trial court, the United States District Court for the Eastern District of Virginia, Richmond Division (hereinafter "the District Court").

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Petitioner misstates certain facts, alleges other facts not in the record and fails to frame a clear legal issue for review. The issue which Petitioner appears to raise is whether there was sufficient evidence at trial to sustain the jury's verdict that Respondents were, in fact, injured in their businesses as a result of Petitioner's admitted price fixing practices in violation of §1 of the Sherman Act (15 U.S.C. §1).

Petitioner distorts completely, by what is described as

"uncontradicted evidence," the debtor-creditor business relationships of Respondents, as franchisees, and Petitioner, as franchisor. Contrary to Petitioner's suggestions, each Respondent purchased and paid for automobile parts, and was given nothing by Petitioner. The simplistic analysis of inventory "received," payments made and inventory returned, ignores totally Respondents' damage proof at trial—specifically, that as a result of Petitioner's price fixing of their purchases and resales of automobile parts, each of them received less income than they otherwise would have realized in their businesses.

Petitioner appears to challenge the decision below only to the extent that the Fourth Circuit affirmed that there was sufficient evidence in the record to support, as a matter of law, the jury's verdict that Petitioner's violations of the antitrust law caused damages to Respondents.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Again, Petitioner sets forth significant and numerous factual misstatements of the record, certain alleged facts not supported by the record, apparent conclusions of counsel, and statements irrelevant to the single issue presented for review. Significantly, not one "fact" asserted by Petitioner is referenced to any part of the record or to any trial exhibit. Moreover, Petitioner in its statement has disregarded the well-established rule of appellate review that the evidence on appeal is to be viewed most favorably to the prevailing party below, and all reasonable inferences from the evidence should be drawn in support of, and not against, the judgment appealed from. The Petition simply ignores any of Respondents' evidence on the damage causation issue.

By way of background, Respondents commenced the action against Petitioner to recover damages to their businesses resulting from price fixing by Petitioner on both Respondents' purchases and resales of automobile parts in the course of their operations as franchisees of Petitioner. It was stipulated by the parties at trial that Petitioner had engaged in price fixing as alleged, in violation of §1 of the Sherman Act, and the only issues presented to the jury were: (i) whether Respondents were damaged as a result of Petitioner's price fixing; and, (ii) the amount of any such damages suffered by each of the Respondents. (R. 561, 563-65, 575-76.) The jury concluded that each Respondent had suffered injury as a result of Petitioner's illegal conduct and decided the amount of the damages suffered by each of them.[1] (R. 595-97.)

The District Court denied Petitioner's motion for judgment notwithstanding the verdict and on June 6, 1978 entered judgments in behalf of each Respondent against Petitioner pursuant to §4 of the Clayton Act (15 U.S.C. §15). The aggregate amount of Respondents' June 6, 1978 judgments totals $168,000.00.

Thereafter, Respondents petitioned the District Court for determination of their reasonable attorney's fees and costs through the trial pursuant to §4 of the Clayton Act. Based upon a stipulation by the parties as to the amounts, judgments were entered on January 11, 1979 in behalf of each of the Respondents in the aggregate amount of

[1]In addition to Respondents Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead and Earl H. Snead, Inc., J. Wayne Dickerson was a plaintiff in the District Court, and also was awarded damages for Petitioner's price fixing in the same trial. Dickerson settled his claim with Petitioner during the pendency of the appeal of the judgments to the Fourth Circuit and is not a party to this appeal.

$31,827.74, representing their attorney's fees and costs through the conclusion of the trial.

Petitioner appealed both sets of judgments in a consolidated appeal in the Fourth Circuit (No. 78-1575 and 79-1162). By its *per curiam* decision and judgments of April 19, 1979 the Fourth Circuit affirmed in all respects all judgments of the District Court. (Petition, p. i-v.)

At trial Respondents proved the fact of their damages by evidence of the difference between the fixed price and the market price, relating both to their purchases and resales of automobile parts. In particular, they demonstrated that they could have purchased automobile parts for *less* than they were forced to pay Petitioner had they been free to purchase such parts in the open market, and they demonstrated that they could have resold their automobile parts for *more* than the resale price fixed by Petitioner had they been free to resell their parts in the open market.

In support of the foregoing, it was stipulated by the parties that the Petitioner charged each of the Respondents the straight "jobber" price level for parts, without discount, while at the same time other automobile parts suppliers in the market area were extending an average volume discount of 8% off the "jobber" price in sales of the same parts to other jobber stores similar to those of Respondents. (Pl. Ex. 1, R. 54; R. 21-3.) The parties also stipulated that Petitioner forced Respondents to resell their automobile parts at the "stocking dealer" price level, a resale price level below the price at which Respondents' competitors normally resold their automobile parts. (Pl. Ex. 1, R. 54; R. 18-9, 23.) The stipulated facts alone support the conclusion that Respondents were damaged by Petitioner—that they could have purchased the same automobile parts from other sources for less than the "jobber" price fixed by Petitioner,

and could have resold their parts at prices greater than the "stocking dealer" price which Respondents were required by Petitioner to charge.

In addition to the stipulated facts, Respondents each testified from their actual business records that, after concluding their association with Petitioner and purchasing and reselling their parts on an unrestricted basis, they were able to actually purchase parts for less and to resell their parts for more. (Pl. Ex. 5,6,9,10,14,15,20,21; R. 60-7, 150-4, 212-8, 308-21.) The fixing of prices by Petitioner, therefore, caused damage to Respondents' businesses by actually requiring each of them to pay a higher price than the market price to purchase automobile parts, and by requiring them to resell their automobile parts for a lower price than the prevailing market resale price. This was a direct damage totally unaffected by the fact that each of the Respondents returned some limited portion of their inventory to Petitioner at the conclusion of their franchises.

Petitioner asserts that it "placed" inventory into Respondents' businesses "without cost" and provided them "free use" of automobile parts for resale on "limitless credit." None of these assertions are factual, supported by the record or by the unambiguous terms of the franchise documents. (Pl. Ex. 2,7,11,12 & 19.) It is evident from even a cursory examination of the subject franchise contracts that Petitioner gave the Respondents nothing. Instead, the parts were purchased with possession, title and risk of loss passing to Respondents. As evidenced by the amount of Respondents' damages caused by Petitioner's price fixing, a heavy price was exacted by Petitioner for the "privilege" of entering into one of its franchise contracts.

MOTION FOR DAMAGES FOR DELAY

Pursuant to Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912, Respondents move for damages against Petitioner, in addition to interest and their costs expended in this appeal, for the reason that this appeal of judgments for the payment of money is without merit and clearly appears to have been sued out merely for delay. Respondents move for damages in the amount of $19,982.77, representing 10% of the principal amount of the June 6, 1978 and January 11, 1979 judgments of the District Court.

ARGUMENT

Petitioner seeks to have this Court review and reverse the Fourth Circuit's affirmation of the factual finding of the jury on the sole issue of causation of damages. There are no conflicting decisions on the legal principles relating to causation of damages under §4 of the Clayton Act, notwithstanding Petitioner's strained effort to demonstrate such a conflict.

A leading decision dealing with causation of damages for antitrust violations is *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed.544 (1931). In that case, involving a monopolism claim in violation of §2 of the Sherman Act, judgment for the plaintiff was rendered on the jury's verdict but that judgment was vacated and the case remanded by the First Circuit on essentially the same issue asserted by Petitioner in this appeal, specifically, that the plaintiff had not, as a matter of law, sustained the burden of proving that it had suffered

recoverable damage. This Court reversed the First Circuit and affirmed the trial court's judgment. The First Circuit had concluded that the plaintiff had failed to prove loss of value to its plant resulting from Sherman Act violations, but this Court noted, in reversing the Court of Appeals, that the First Circuit had drawn its own inferences from the facts presented, which inferences were "within the exclusive province of the jury, and which could not be drawn by the Court contrary to the verdict of the jury without usurping the functions of that fact finding body." 282 U.S. at 566, 75 L.Ed. at 550. Whether the plaintiff's damages were the proximate result of the defendant's unlawful conduct was a question of fact for the jury, and "the finding of the jury upon that question must be allowed to stand unless *all reasonable men,* exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." 282 U.S. at 566, 75 L.Ed. at 550, emphasis added.

The later decision in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed. 652 (1946) also bears directly on the damage causation issue. In *Bigelow,* the plaintiffs were owners of a motion picture theatre who sued certain distributors of moving picture films alleging conspiratorial and discriminatory distribution of films which damaged their theatre and favored competing theatres. Based upon the jury's verdict for plaintiffs, judgment was rendered by the district court in their favor, but on appeal to the Seventh Circuit that judgment was reversed and final judgment was entered in the defendant's favor on the sole issue of the sufficiency of damage evidence. This Court reversed the Seventh Circuit, noting that "[t]he evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondent's action. . . ." 327 U.S. at 266, 90 L.Ed. at 661.

Significantly, the plaintiffs in *Bigelow* introduced two classes of evidence to prove their damages. 327 U.S. at 357-8, 90 L.Ed. at 657. The first was a comparison of plaintiffs' earnings with a competing, comparable theatre during the period in question. The second—similar to that of Respondents in the District Court—was a comparison of plaintiffs' receipts from their business operation before and after the unlawful actions of the defendants. On appeal to this Court the defendants argued that "the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of the damage," but in rejecting this argument this Court offered the following analysis:

> The case in these respects is comparable to Eastman Kodak Co. v. Southern Photo Materials Co. 273 U.S. 359, 71 L.Ed. 684, 47 S. Ct. 400, and Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L.Ed. 544, 51 S. Ct. 248, in which precisely the same arguments now addressed to us were rejected. There as here, the suits were for damages caused by restraints imposed by defendants, in violation of the Sherman Antitrust Act, on the operation of the business of the complainant in each case. In the one case, the defendant, in an effort to extend its monopoly, refused to sell to the plaintiff goods which had regularly been a part of his stock in trade. In the other, the defendants, competing sellers, engaged in destructive price competition with the plaintiff in execution of an unlawful conspiracy. *In the first case, the plaintiff sought to establish his damage by comparing his profits before and after the unlawful interference with his business. In the other, the plaintiff sought to show his damage by proof of the difference between the amounts actually realized from his business after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices,* the

evidence of which was the amount by which his current prices were higher before the conspiracy than after, and by the extent to which the value of plaintiff's business property had declined after the conspiracy had begun to operate.

In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of *just and reasonable inference* from the proof of defendants' wrongful acts and their *tendency to injure* plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In this we but followed a well settled principle. (327 U.S. at 263-4, 90 L.Ed. at 659-60, emphasis added.)

In an instance where a plaintiff's damages may have been attributable to more than one factor, the plaintiff need only prove that the defendant's unlawful conduct was a substantial cause of the damage, rather than the sole cause or even a cause more substantial than any other. *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 806 (1st Cir.), *cert. denied,* 379 U.S. 931, 85 S. Ct. 329, 13 L.Ed.2d 343 (1964). "[I]n a case where the damages cannot be precisely calculated because of the interaction of concurrent causes, there is no burden of excluding all other causes of loss, and. . . estimates based upon such evidence as is 'reasonably available' under the circumstances may be accepted." 333 F.2d at 806, n.16.

Respondents' proof as to the causation of the damages suffered by them in their businesses was consistent and straightforward. They proved the fact of their damages, in a method consistent with *Bigelow,* by showing the difference between the fixed price and the market price. As noted more

fully above, each of the Respondents proved, both through the stipulated facts and their testimony and exhibits, that their businesses were damaged because: (i) they could have purchased automobile parts for *less* than they were forced to pay Petitioner had they been free to purchase such parts on the open market; and, (ii) they could have resold their automobile parts for *more* than the resale price fixed by Petitioner had they been free to resell their parts in the open market. There is no reasonable doubt that if Respondents could have purchased automobile parts in the open market for less than the "jobber" price (the purchase price level fixed by Petitioner), they suffered direct damage and injury to their businesses by having to pay out more money to Petitioner to purchase such parts than they otherwise should have paid. So also, there is no reasonable doubt that if Respondents could have resold their automobile parts in an open market for more than the "stocking dealer" price (the resale price level fixed by Petitioner), they would have received more income than they actually did receive absent the resale price restraints imposed by Petitioner. The facts shown at trial, and the reasonable inferences drawn therefrom, fully support the jury's verdict finding that each of the Respondents suffered injuries caused by Petitioner's antitrust violation in these areas. Certainly, it can not be said that "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co., supra,* 282 U.S. at 566, 75 L.Ed. at 550.

With the exception of the *Story Parchment* decision, the decisions cited in the Petition have no relevance to this appeal. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 43 S. Ct. 47, 67 L.Ed. 183 (1922) did not involve an action for

damages under §4 of the Clayton Act and dealt with preliminary motions on the pleadings, rather than a review of a jury verdict on the damage causation issue. Petitioner points to the fifth Circuit's decision in *World of Sleep v. Stearns & Foster Co.*, 525 F.2d 40 (10th Cir. 1975) and claims that this decision conflicts, in some undefined manner, with the law applied by the Fourth Circuit in the instant case. It is also contended, again without detail, that the decisions of this Court conflict with the law as applied by the Fourth Circuit. But Petitioner's argument fails for several reasons. First, it has never been Respondents' position, nor was it the holding of the Fourth Circuit, that Respondents could recover damages merely by proving a violation of the antitrust laws. As both the District Court and the Fourth Circuit agreed, Respondents offered sufficient evidence of the fact of their damages caused by Petitioner's conduct to support the jury's verdict. Second, the Fourth Circuit in its *per curiam* decision did not cite a single case or make any conclusions of law. How, then, can Petitioner claim in good faith that the *World of Sleep* decision conflicts with the Fourth Circuit's application of the law in this case? Third, as noted above in the references to *Story Parchment* and *Bigelow*, this Court's decisions on causation of damages under §4 of the Clayton Act are not in conflict, nor do they conflict with the decisions of the Fourth or Fifth Circuits.

Petitioner has failed to demonstrate that there are any legal issues presented by this case of sufficient importance to warrant the attention of this Court. The review requested by Petitioner would involve only questions of evidence applied under familiar, well-established legal principles. As is clear from its decision, the Fourth Circuit gave full and complete consideration to the damage causation issue and decided that issue correctly.

Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912 (set out in the addendum hereto) are designed to compensate the prevailing party on appeal for damages resulting from delay in the instance of a frivolous appeal. *See, e.g., Slaker v. O'Connor*, 278 U.S. 188, 49 S. Ct. 158, 73 L.Ed. 258 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 43 S. Ct. 589, 67 L.Ed. 961 (1923); *Southern R. Co. v. Gadd*, 233 U.S. 572, 34 S. Ct. 696, 58 L.Ed. 1099 (1914). It is submitted that the appeal of a *per curiam* decision in which no conclusions of law are stated, the general unsubstantiated contentions of Petitioner, the total absence of any specific references to the record in support of the "facts" recited in the Petition, the serious and misleading misstatements of the terms of the franchise contracts between the parties to this appeal, the failure of Petitioner to make any reference to Respondents' damage proof relating to their purchases and resales, and the specious argument that there is a "conflict" in the application by the Fourth and Fifth Circuits of the law applicable to this appeal or a "conflict" between the decisions of this Court and the law applied by the Fourth Circuit on the damage causation issue, all lead to the conclusion that this appeal was brought, not in good faith or with any expectation of success, but to delay still further the payment of Respondents' damages resulting from Petitioner's illegal conduct. The Petition is an abuse of this Court, as well as damaging to Respondents, and it is submitted that an award of damages equal to 10% of the aggregate principal amounts of the June 6, 1978 and January 11, 1979 judgments is appropriate under Rule 56.

CONCLUSION

For the reasons stated above, Respondents ask that the Petition for Writ of Certiorari be denied and move that they be awarded damages for delay, in addition to interest on the judgments at the applicable rate, and their costs of this appeal.

Respectfully submitted,

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ADDENDUM

Rule 56 of the Rules of the United States Supreme Court.

Interest and Damages.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.

3. In cases in admiralty, damages and interest may be allowed only if specially directed by the Court.

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

* * *

28 U.S.C. §1912. **Damages and costs of affirmance.**

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.